BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

TRINA M. STANFORD,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 09-12-461**
v.	)	
	)	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	**DECISION AND ORDER**
	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on October 21, 2010 and continued on October 27, 2010 at the Public Service Commission, Silver Lake Plaza, Canon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, Victoria D. Cairns, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Perry F. Goldlust, Esquire
on behalf of Trina M. Stanford

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

PRELIMINARY MATTERS

At the hearing on October 21, 2010, the Board considered two preliminary legal issues after briefing by the employee/grievant, Trina M. Stanford (Stanford), and the Department of Health and Social Services (DHSS): (1) the legal standard in an appeal to the Board when an employing agency terminates an employee for unsatisfactory job performance; and (2) whether Merit Rule 12.8 precludes the Board from admitting evidence of an employee's unsatisfactory job performance more than two years prior to the notice of intent to terminate.

The Board decided that a just cause standard applies to a termination based on unsatisfactory job performance. Under that standard, termination requires "a legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee's competency and ability to perform his duties." *Vann v. Town of Cheswold*, 945 A.2d 1118, 1122 (Del. 2008) (en banc). 1

The Board decided that Merit Rule 12.8 does not preclude evidence of an employee's unsatisfactory job performance more than two years prior to the notice of intent to terminate. The Board believes that Merit Rule 12.8 applies to disciplinary action for an "offense," and only precludes an agency from citing similar offenses which occurred more than two years before as just cause for subsequent discipline.

When termination is based on unsatisfactory job performance, the agency's "consideration is not limited to unsatisfactory performance within the past two years" and it is "appropriate for [the agency] to consider the [employee's] entire employment history." *Squire v. Board of Education of the Red Clay Consolidated School District*, C.A. No. 04A-11-001-FSS, 20076 WL 258309, at p. (Del. Super., Jan. 18, 2006), *aff'd*, No. 77, 2006, 911 A.2d 804 (TABLE). Accordingly, the Board

1 In their briefs, the parties agreed that the *Vann* standard should apply in this case.

will admit evidence of Stanford's job performance more than two years prior to the notice of intent to terminate such as her 2006 and 2007 performance reviews.

During one of the Board's deliberations on October 17, 2010, Stanford's legal counsel asked the Chair to recuse herself from hearing the case after she referred to her experience in human resource management at DHSS. (The Chair retired from DHSS in 2003). Stanford's legal counsel contended the Board was considering evidence outside the record in violation of due process.

"It is a general rule of law that it is improper for an administrative agency to base a decision, or finding in support thereof, on evidence or information outside the record." *Trade v. Caulk*, C.A. No. 91A-11-003, 1992 WL 140894, at p.2 (Del. Super., June 10, 1992)). "Generally, the use of such information or evidence constitutes a due process violation." *Id.* However, it is "a rule familiar to the law, and followed by fact-finding tribunals, that it is permissible to draw on experience in factual inquiries." *Pennsylvania Labor Relations Board v. Sand's Restaurant Corp.*, 240 A.2d 801, 805 (Pa. 1968) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945)). *Accord Kundrat v. State Dental Council & Examining Board*, 447 A.2d 355, 358 (Pa. Cmwlth. 1982) ("[T]he dentists sitting on the Board which heard the case are knowledgeable and experienced in the field of dental medicine and the procedures connected therewith. As such, they are permitted to draw on their expertise in ruling on matters which come before them.").

The Board "shall consist of 5 Board members, including 2 management representatives, 2 labor representatives and a chairperson." 29 *Del. C.* §5906(a). By specifying the composition of the Board in this way, the legislature intended the members to draw on their labor or management expertise in deciding cases. There was no legal reason for the Chair to recuse herself for drawing on her human resource management expertise to decide this case, just as there is no legal basis to recuse a Board member from drawing on labor expertise. The other members of the Board concurred that

the Chair should not recuse herself from hearing this appeal.

BRIEF SUMMARY OF THE EVIDENCE

The Board admitted into evidence eighteen exhibits offered by DHSS marked for identification as Exhibits A-R. DHSS called three witnesses to testify: Midge Holland, Chief of Administration, Division of Child Support Enforcement (DCSE); Hope LaChance, DCSE Fiscal Administrative Officer; and Kelli L. Stepler, DCSE Senior Accountant.

The Board admitted into evidence thirty-one exhibits offered by Stanford marked for identification as Exhibits 1-31. Stanford did not call any witnesses and did not testify on her own behalf.

FINDINGS OF FACT

Stanford started working at DCSE on February 22, 2002 as an Account Specialist in the Payment Processing Unit processing child support payments. When DCSE receives a check from a child support obligor or the obligor's employer, an Account Specialist reviews the check to make sure that the numbered and written amount conform and the check is properly dated and signed. The Account Specialist then is responsible for posting the check to the account of the custodial parent by verifying at least two of four criteria: the name and social security number of the child support obligor, and the DCSE or Family Court file number.

Federal regulations require DCSE to post child support checks within two business days. The federal Office of Child Support Enforcement conducts annual audits. If DCSE does not comply with federal regulations it could lose federal funding which accounts for two-thirds of the agency's budget. Posting a check to the wrong account has a ripple effect. The custodial parent does not receive the money to support a child. If the money goes to the wrong custodial parent, DCSE can try

to recoup the money, but if the agency cannot it must pay the proper custodial parent out of the agency's own funds.

Prior to February 2009, check processing at DCSE was a paper-based system where incoming checks were "batched" for processing. In February 2009, DCSE implemented new software – Rapid System – which is an image-based system. Incoming checks are scanned and then reviewed by an Account Specialist on a computer screen. Prior to implementing Rapid System, DCSE provided classroom training. According to DHSS employee training records, Stanford received four hours of classroom training on November 8, 2008, four hours on November 20, 2008, and four hours on December 9, 2008. Midge Holland, the DSCE Chief of Administration, testified that the Rapid System vendor had its people on site up until the system went "live" in February 2009 to provide "elbow support" for DCSE employees transitioning to the new automated system.

Stanford's supervisor, Kelli Stepler, gave Stanford an unsatisfactory performance review for the period January 4 to May 29, 2008. Stepler attached a breakdown of eighteen errors by Stanford such as posting bad checks and posting checks to the wrong account. Stepler noted: "Beginning on Jan 04, 2008, I began to intermittently counsel you regarding your attention to detail and accountability while handling client payments. . . . When speaking with you regarding your errors you have offered some possible explanations and some solutions on ways to avoid future infractions; however, you have yet to try and implement any of these solutions. Your inability to self-correct your poor performance is unacceptable, resulting in this unsatisfactory performance review." Stepler advised Stanford that she would review Stanford's errors, as discovered, on a weekly basis and "Stanford's performance will be re-evaluated in 30 days."

On June 16, 2008, Stepler gave Stanford a written reprimand "for your continued failure to follow proper payment processing procedures." The reprimand noted that in 2006 Stanford's error rate was .15% compared to the unit's average error rate of .051%, and in 2007 her error rate was .085% compared to the unit's average error rate of .0488%. DCSE computes the error rate by

dividing the total checks processed by the total errors for a particular time period, so it does not make any difference how many days the Account Specialist works. The reprimand warned Stanford: "Your performance will be reviewed again and subsequent unsatisfactory performance will lead to further disciplinary action, including termination of employment."

Stepler gave Stanford an unsatisfactory performance review for the period June 16, 2008 to February 6, 2009 because of "severe deficiencies in producing accurate results even with supervisory counseling." The performance review cited checks Stanford posted to the wrong account in August, October, and December 2008.

Between April 2 and August 13, 2009, Stepler sent Stanford seventeen e-mails attaching checks Stanford had improperly processed. Some of the checks were not signed, some Stanford encoded for the wrong amount, and others she posted to the wrong account. By letter dated August 27, 2009, Hope LaChance, the DCSE Fiscal Administrative Officer, notified Stanford: "I am proposing your dismissal from your position as an Accounting Specialist, at the Division of Child Support Enforcement (DCSE), for performance deficiencies." The letter included "a list of financial instruments that were incorrectly processed. This list is a sampling of the types of errors that have been discovered. There were a total of 43 errors recording [*sic*] during this review period [June 16, 2008 to February 6, 2009]." "Since the last review period, you have continued to make numerous errors. Below is a list of [sixteen] financial instruments that were encoded by you in an amount other than what was listed on the financial instrument." According to LaChance, "Every effort has been made to help you improve your job performance. Your responsibilities were significantly reduced, you were offered training opportunities, and met regularly with your supervisor. Even so, your job performance continues to be unsatisfactory."

Stanford had a pre-termination meeting on September 23, 2009. By letter dated October 5,

2009, the Secretary of DHSS notified Stanford of her termination "effective as of the date of this letter."

CONCLUSIONS OF LAW

The Board concludes as a matter of law that DHSS had just cause to terminate Stanford for unsatisfactory job performance. Stanford's numerous and repeated errors in processing child support checks was a "legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee's competency and ability to perform [her] duties." *Vann*, 945 A.2d at 1122.

Stanford's Employee Performance Plan emphasized how important it was to "Expeditiously process child support payments, assuring accuracy, so that the posting of the Payment and subsequent disbursement is correct, and in accordance with federal and state Guidelines." Accuracy is critical. If a mistake is made, a custodial parent does not receive much-needed support to care for a child.

The record is replete with Stanford's errors in processing child support checks. She processed some checks which were not signed. She processed some checks encoding the wrong amount. She posted other checks to the wrong account. Stanford received an unsatisfactory performance review for the period January 4 to May 29, 2008. Stanford received a written reprimand on June 16, 2008 "for your continued failure to follow proper payment processing procedures." [2] Stanford received another unsatisfactory performance evaluation for the period June

[2] The Board notes that the June 16, 2008 letter of reprimand refers back to deficiencies highlighted in Stanford's 2006 and 2007 performance reviews. Even if the two-year rule in Merit Rule 12.8 applied, the reprimand was within two years of the date of the notice of intent to terminate Stanford (August 27, 2009). In any event, the Board does not rely on Stanford's 2006

16, 2008 to February 6, 2009. And yet she continued to make the same kinds of errors over and over. Stanford's termination letter cited sixteen encoding errors between February and June 2009 involving checks totaling $35,000. Stanford's job performance showed little if any improvement despite frequent counseling about these deficiencies.

Stanford argued that 100% error-free check processing is unrealistic and DCSE does not have any written standards as to what error rate is tolerable or not. According to Stanford, there will always be one employee in the Payment Processing Unit whose error rate is higher than the others and which may be grounds for termination even though the error rate did not result in an unfavorable audit by the federal Office of Child Support Enforcement.

Midge Holland testified that 100% error-free check processing is only a "goal" as the agency continually seeks to improve its operations for the benefit of the children owed support. The record shows that DCSE did not compare Stanford's error rates against individual employees, but rather against the average employee error rate in the Payment Processing Unit. The Board does not believe that Stanford's error rate had to result in a loss of federal funding before DHSS had just cause to terminate her. Stanford's error rate had other substantial adverse impact on the agency: for example, custodial parents and children in need going without timely support, which the agency had to reimburse out of its own funds.

Stanford argued that, because she took intermittent leave under the Family Medical Leave Act (FMLA) in 2008 and 2009, she processed fewer transactions making a small number of errors appear statistically high. But DCSE computes error rates by dividing the total number of checks

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and 2007 performance reviews. The Board finds substantial evidence in the record from 2008 and 2009 to conclude that DHSS had just cause to terminate Stanford for unsatisfactory performance.

processed by the total number of errors for a particular time period so it does not make any difference how many days Stanford worked.

Stanford's doctor certified her for FMLA leave for stress, anxiety, and depression. Stanford suggested that her medical problems were caused by DCSE's insistence on error-free check processing and unrealistic production standards. The record demonstrates that DSCE did not hold any employee in the Payment Processing Unit to an error-free standard and did not apply production standards. 3

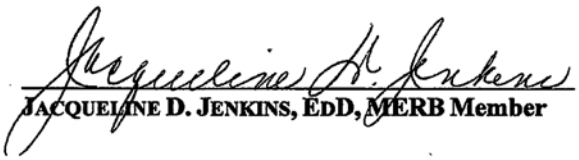
Stanford also claimed that her supervisors were aware of her medical problems and should have taken them into account in assessing her error rates, or provided her with additional training or some special accommodation. The record shows that Stanford's supervisors received notice from the human resources office when she was going to take FMLA leave, but they did not know the specific medical reason for each period of leave. Stanford did not convince the Board of any mitigating circumstances to show that termination for unsatisfactory job performance was inappropriate. The Board concludes as a matter of law that DHSS had just cause to terminate Stanford.

3 In an e-mail dated February 24, 2009, Kelli Stepler stated that "I haven't yet come up with any standard times on how fast anyone should be producing in RAPID once the training phase is over, but there will be some standards everyone will have to adhere to." Stepler testified that she never developed or applied any productivity standards for employees in the Payment Processing Unit except for a brief period when DCSE was transitioning to the Rapid System.

ORDER

It is this **29th** day of November, 2010, by a vote of 4-0, the Decision and Order of the Board to deny Stanford's appeal.

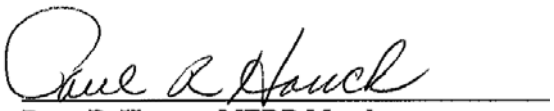
MARTHA K. AUSTIN, MERB Chairwoman



JACQUELINE D. JENKINS, EDD, MERB Member

JOHN F. SCHMUTZ, MERB Member

VICTORIA D. CAIRNS, MERB Member



PAUL R. HOUCK, MERB Member

I respectfully dissent. I do not believe that DHSS had just cause to terminate Stanford.

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c)The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: November 29, 2010

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